DIVISION ONE
FILED: 03/31/11
RUTH WILLINGHAM, ACTING CLERK
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| LORENE A. KINLICHEENIE,<br><br>Petitioner,<br><br>v.<br><br>THE INDUSTRIAL COMMISSION OF ARIZONA,<br><br>Respondent,<br><br>HEALTHCARE DEPOT LLC dba PROFESSIONAL NURSING,<br><br>Respondent Employee,<br><br>SCF ARIZONA,<br><br>Respondent Carrier. | No. 1 CA-IC 09-0065<br><br>DEPARTMENT B<br><br>**MEMORANDUM DECISION**<br><br>(Not for Publication – Rule 28, Arizona Rules of Civil Appellate Procedure) |

Special Action – Industrial Commission

ICA Claim No. 20070-090124

Carrier Claim No. 06-53117

Administrative Law Judge Joseph L. Moore

**AWARD AFFIRMED**

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The Industrial Commission of Arizona
Attorneys for Respondent

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SCF Arizona

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Attorneys for Respondents Employer and Carrier

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G E M M I L L, Judge

**¶1** Petitioner employee Lorene A. Kinlicheenie ("claimant") seeks special action review of an Industrial Commission of Arizona ("ICA") award and decision upon review for a scheduled permanent partial impairment. Two issues are presented on appeal:

> (1) whether the administrative law judge ("ALJ") erred by refusing to unschedule claimant's December 23, 2006 scheduled industrial injury ("2006 injury"); and
>
> (2) whether the ALJ erred by failing to allow claimant to present testimony from a labor market expert.

Finding no error, we affirm.

**¶2** This court has jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2) (2003), 23-951(A) (1995), and Arizona Rules of Procedure for Special Actions 10. In reviewing findings and awards of the ICA, we defer to the ALJ's factual findings, but review questions of law de novo. *Young v. Indus. Comm'n*, 204 Ariz. 267, 270, ¶ 14, 63 P.3d 298, 301 (App. 2003). We consider the evidence in a light most favorable to upholding the ALJ's award. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105, ¶ 16, 41 P.3d 640, 643 (App. 2002).

## 1991 Injury

**¶3** On April 23, 1991, the claimant was employed as a nursing

assistant at Lutheran Hospitals and Homes when she sustained an industrial injury to her left thumb and shoulder. The claim eventually closed, and the ICA entered a Findings and Award for an Unscheduled Permanent Partial Disability. The claimant filed a hearing request, but prior to the hearing, the parties entered into a settlement agreement. The settlement included the following terms:

> 1. The carrier will pay applicant the sum of $35,169.52, which sum reflects a total settlement sum of $37,500.00 minus the $2,330.48 previously paid to the applicant.
>
> 2. The applicant withdraws her September 2, 1993 Request for Hearing concerning her temporary partial disability wage benefits and agrees to make no further claim to such benefits now or in the future in consideration of the settlement sum being paid her.
>
> 3. <u>The parties stipulate that the applicant has sustained no loss of earning capacity as a result of her April 23, 1991 industrial injury.</u>

(Emphasis added.) This settlement agreement was approved by the ICA and became final.

**<u>1995 Injury</u>**

**¶4** On January 6, 1995, the claimant was working as a certified nursing assistant for the Lutheran Healthcare Network when she sustained a right wrist injury. This claim eventually was closed, and the ICA entered a Findings and Award for an Unscheduled Permanent Partial Disability. The respondent carrier timely requested a hearing, and the parties entered into a compromise and

settlement agreement that included the following terms:

> 1. The applicant stipulates that she has not sustained a loss of earning capacity as a result of the industrial injury of January 6, 1995.
>
> 2. In consideration of the above stipulation, upon the approval and finality of an award approving this Compromise and Settlement Agreement, defendants shall pay to applicant the sum of Ten Thousand Dollars ($10,000.00). The defendants shall have a credit in the amount of Ten Thousand Dollars ($10,000.00) against any future temporary or permanent disability compensation benefits to which applicant may become entitled upon reopening of this claim. This credit shall not apply to applicant's entitlement to future medical benefits.

(Emphasis added.) This agreement was submitted to the ICA and approved by an ALJ.

**2006 Injury And Award**

**¶5** On December 23, 2006, the claimant was employed as a certified nursing assistant by the respondent employer, Healthcare Depo LLC dba Professional Nursing. On that date, she was attempting to move a patient in a wheelchair and she injured her left elbow. The claimant experienced pain, numbness, and tingling from her neck down her arm to her fingers. She filed a workers' compensation claim, which was accepted for benefits and she received conservative medical treatment.

**¶6** Two years later, this claim was closed with a two percent scheduled permanent partial impairment to the left upper extremity.

The claimant timely requested a hearing. She initially asserted that she was not stationary and, alternatively, if she was stationary, she had sustained an unscheduled permanent impairment. A hearing was held for testimony from the claimant. Following the hearing, the parties agreed that the sole issue for decision by the ALJ was whether the 2006 injury should be closed as scheduled or unscheduled, based on one of the claimant's prior industrial injuries.

**¶7** The ALJ entered an award for a scheduled permanent partial impairment. In the award, the ALJ found:

> 2. Applicant submits that it was legal error for the defendant insurance carrier to categorize applicant's permanent disability benefits entitlement in this claim as a scheduled disability, pursuant to A.R.S. § 23-1044(B) (based upon the 2% permanent impairment to applicant's left upper extremity), because, as a matter of law, it should be determined that applicant has suffered a loss of earning capacity stemming from the permanent medical impairment that she sustained in her 1991 and 1995 claims. I reject that assertion for the reason set forth at paragraph 2 of defense counsel's April 20, 2009 correspondence, i.e., because applicant, having entered into compromise and settlement agreements addressing permanent disability issues in both the 1991 and 1995 claims, stipulated, as to both, that she suffered no loss of earning capacity. Those compromise and settlement agreements were approved by administrative law judges, and, importantly, the no loss of earning capacity permanent disability awards in the 1991 and 1995 claims have not been rearranged.[1]

[1] The rearrangement statute provides that a final permanent disability award may be subject to change upon a showing, in accordance with the statutory requirements, of a reduction in

(Footnote omitted.)

The claimant timely requested administrative review, and the ALJ summarily affirmed his award. The claimant then brought this appeal.

**ANALYSIS**

**¶8** The claimant argues that both her 1991 and 1995 industrial injuries resulted in losses of earning capacity, which should have unscheduled her 2006 injury. While we agree that the ICA initially awarded losses of earning capacity in both the 1991 and 1995 injuries, both awards were protested and neither claim proceeded to a loss of earning capacity ("LEC") determination because the claimant settled both claims. In each compromise and settlement agreement, the claimant expressly stipulated that she had sustained no LEC as a result of her industrial injury.

**¶9** Issues of validity and enforceability of stipulations in settlement agreements in workers' compensation cases are resolved pursuant to contract principles. *Pac. W. Constr. Co. v. Indus. Comm'n*, 166 Ariz. 16, 19, 800 P.2d 3, 6 (1990). The claimant has not sought to have either agreement rescinded or declared void.

**¶10** The claimant further argues that the 1995 wrist[2] injury

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earning capacity arising out of the industrial injury. *See* A.R.S. § 23-1044(F) (Supp. 2010).

[2] Wrist injuries are typically compensated as a percentage of the loss of use of a major or minor arm, which are scheduled injuries

could not have been closed as unscheduled unless the ICA recognized a permanent LEC resulting from her 1991 unscheduled left thumb and shoulder[3] injury. The problem with claimant's arguments is that, as already noted, she agreed to settlements of both her 1991 and 1995 injury claims, expressly agreeing to no LEC from each injury, and the ICA through its ALJs considered and approved both settlement agreements.

**¶11** Contractually, the claimant had the right to enter into each settlement agreement and to accept a cash payment in lieu of her rights under the initial ICA awards. *See Safeway Stores v. Indus. Comm'n*, 152 Ariz. 42, 44-49, 730 P.2d 219, 221-26 (1986). The legal result of this was that the claimant had prior unscheduled injuries without an LEC, which are insufficient to unschedule her 2006 scheduled industrial injury.[4]

**¶12** The claimant also argues that the ALJ erred by failing to

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pursuant to A.R.S. § 23-1044(B). *See, e.g., Camis v. Indus. Comm'n,* 4 Ariz. App. 312, 314-15, 420 P.2d 35, 37-38 (1966).

[3] Shoulder injuries typically are compensated as unscheduled injuries pursuant to A.R.S. § 23-1044(C). *See, e.g., Dye v. Indus. Comm'n*, 153 Ariz. 292, 294, 736 P.2d 376, 378 (1987).

[4] Even assuming arguendo that the 1995 claim should have been closed as a scheduled injury based on the claimant's settlement of her 1991 unscheduled injury with no LEC, that determination was not protested and it became final. *See Gallegos v. Indus. Comm'n*, 144 Ariz. 1, 4, 695 P.2d 250, 253 (1985) ("Right or wrong, the facts determined by the final order are binding."); *Church of Jesus Christ of Latter Day Saints v. Indus. Comm'n*, 150 Ariz. 495, 498, 724 P.2d 581, 584 (App. 1986) (after the ninety-day protest period neither the claimant nor the carrier can avoid the effect of a notice by claiming it to be erroneous).

allow her to present testimony from a labor market expert to prove that she had sustained an LEC as a result of her 1991 or 1995 unscheduled injuries. We disagree. The 1991 and 1995 injury claims were closed by awards that adopted the settlement agreements, which, in both instances included the stipulation that claimant had not sustained an LEC. Accordingly, the stipulated determinations of no LEC are binding under the doctrine of res judicata unless modified in accordance with statutory procedures. Here, the awards had not been modified.

**¶13** Section 23-1044(E), A.R.S., determines when an otherwise scheduled injury will be unscheduled. This statute provides:

> In case there is a previous disability, as the loss of one eye, one hand, one foot or otherwise, the percentage of disability for a subsequent injury shall be determined by computing the percentage of the entire disability and deducting therefrom the percentage of the previous disability as it existed at the time of the subsequent injury.

(Emphasis added.) The Arizona Supreme Court has held that pursuant to A.R.S. § 23-1044(E), a scheduled industrial injury becomes unscheduled by virtue of a prior industrial injury only if the claimant suffered a loss of earning capacity as a result of the first injury. *See Alsbrooks v. Indus. Comm'n*, 118 Ariz. 480, 483-84, 578 P.2d 159, 162-63 (1978).

**¶14** We acknowledge that it is possible that claimaint may have suffered an LEC from one or of both her 1991 or 1995 injuries. But she settled both injury claims in agreements that specifically

stated that she had no LEC from the injury in question. At the time of the 2006 injury, the ICA awards approving the settlements from the 1991 and 1995 injury claims had not been rearranged or modified in any way. Therefore, claimant's official records establish that she had no LEC at the time of the 2006 injury. Because claimant's LEC needed to exist at the time she sustained her 2006 injury in order to unschedule her 2006 disability, the proposed labor market testimony would have been irrelevant to these proceedings. *See Modern Industries Inc. v. Indus. Comm'n*, 125 Ariz. 283, 287, 609 P.2d 98, 102 (App. 1980) (explaining that "in order to convert a subsequent scheduled injury into the unscheduled class, a loss of earning capacity attributable to a prior injury must exist at the time of the subsequent injury" and that "A.R.S. § 23-1061(H) (dealing with petitions to reopen) provides benefits only prospectively from the date of filing the petition to reopen") (emphasis omitted). *See also Hurley v. Indus. Comm'n,* 12 Ariz. App. 162, 163, 468 P.2d 613, 614 (1970).

**¶15** For these reasons, we affirm the award.

____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
DIANE M. JOHNSEN, Presiding Judge

____/s/_____
MICHAEL J. BROWN, Judge